

BEFORE THE MONTANA DEPARTMENT  
OF LABOR AND INDUSTRY

IN THE MATTER OF HUMAN RIGHTS CASE NO. 0051011210

|                       |   |                              |
|-----------------------|---|------------------------------|
| MATT O'DEA,           | ) | Case No. 2091-2005           |
|                       | ) |                              |
| Charging Party,       | ) |                              |
|                       | ) |                              |
| vs.                   | ) | <b>FINAL AGENCY DECISION</b> |
|                       | ) |                              |
| BNSF RAILWAY COMPANY, | ) |                              |
|                       | ) |                              |
| Respondent.           | ) |                              |

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**I. PROCEDURE AND PRELIMINARY MATTERS**

Matt O'Dea filed a complaint with the Department of Labor and Industry on September 1, 2004. He charged that BNSF Railway Company discriminated against him because of perceived disability (obesity) when it disqualified him for a training position as a Conductor Trainee on or about May 19, 2004. On April 13, 2005, the department gave notice O'Dea's complaint would proceed to a contested case hearing, and appointed Terry Spear as hearing examiner. The parties stipulated that the department could retain the case and set the contested case hearing for more than 12 months after complaint filing. On August 11, 2006, the hearing examiner granted O'Dea's motion for summary ruling on liability.

The contested case hearing on damages proceeded on August 17, 2006, in Great Falls, Montana. O'Dea attended with counsel, Brian C. Bramblett, Trieweiler Law Firm. BNSF attended with counsel, Jeff Hedger, Phillips Bohyer & Hedger, PC. The hearing examiner's docket accompanies this decision. Matt O'Dea, Don Agan and Joseph Kasperick testified. Exhibits 1-15, 18-21 (including 21C, containing handwritten changes), 23-26, 28-29, 101-115 and 136-137 were admitted.

**II. ISSUES**

Liability having been established, the issues for hearing were: (1) What harm did O'Dea sustain and what reasonable measures should be ordered to rectify such harm and (2) In addition to an order to refrain from such conduct what should the department require of BNSF to correct and prevent similar discriminatory practices?

### III. FINDINGS OF FACT<sup>1</sup>

1. In March 2004, charging party Matt O'Dea, who resides in Kalispell, Montana, applied electronically to respondent Burlington Northern and Santa Fe Railway Company ("BNSF") for a job as a conductor trainee, with the position located at Havre, Montana.

2. On April 5, 2004, Human Resource Manager Larry Martin, BNSF Terminal Manager Eugene See and UTU Training Coordinator John Tibbets interviewed O'Dea and other candidates in Havre.

3. On April 16, 2004, Martin extended a conditional offer of employment with BNSF to O'Dea, contingent on proof of permanent employment eligibility in the United States, receipt and review of a completed BNSF medical history questionnaire and successful completion of a drug screen, physical examination and Industrial Physical Capability Services ("IPCS") exam.

4. O'Dea timely completed and submitted BNSF's medical questionnaire.

5. On April 21, 2004, O'Dea completed BNSF's IPCS Exam, which was conducted by Thomas Gilliam, Ph.D. The IPCS exam is a physical capability assessment of the knees and shoulders that tests the applicant's ability to perform the tasks required of the position he seeks. The test provided objective data about the muscle groups critical to safe performance of essential functions of the physically demanding job. O'Dea's IPCS exam resulted in a recommendation that BNSF hire him for the train service job class rating. O'Dea was told that he had passed the test.

6. On April 27, 2004, Dr. Charles Dixon performed a physical examination and concluded that O'Dea could work as a BNSF conductor without restrictions.

7. BNSF's in-house medical staff reviewed O'Dea's medical information and concluded that he was not medically qualified to work in train service as a conductor or engineer.

8. O'Dea's Body Mass Index (BMI) justified classifying him as having extreme or "morbid" obesity. That classification was O'Dea's only present condition leading to BNSF's decision that he was not medically qualified for a train service job. O'Dea had no health problems because of his size that limited his current ability to work.

9. On May 19, 2004, BNSF sent an Examinee Health Report to O'Dea indicating that he was disqualified from the conductor position due to his obesity: "Per BNSF Medical Director, not medically qualified for position of Train Service at this time due to significant risk

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<sup>1</sup> The summary ruling that BNSF illegally discriminated against O'Dea in employment because of a condition it regarded as a disability (morbid obesity) and the parties' agreed facts form the bases for Finding Nos. 1-10 and 15 herein.

associated with obesity.”

10. On May 19, 2004, BNSF, because it regarded O’Dea’s condition (morbid obesity) as a disability, withdrew its conditional offer of employment to O’Dea and rejected him for employment as a conductor trainee. BNSF took this adverse employment action without first undertaking an independent individualized assessment of the risk of substantial harm to O’Dea or others due to his current physical condition.

11. O’Dea was born on January 23, 1970. He graduated from high school in 1989, and left college after one year of general studies in 1990. He has no other formal education, nor specialized training of any kind. O’Dea’s first job after leaving school was as a worker at a Town Pump, where he performed various jobs and earned between \$5.85 and \$6.50 an hour.

12. At the time he applied for work with BNSF, O’Dea resided in Kalispell, Montana, and worked for Plum Creek Manufacturing in Columbia Falls, Montana. He had worked for Plum Creek, first as a laborer and later as a fork lift operator, for eleven years, after leaving his Town Pump job. His earnings at Plum Creek averaged \$45,728 from 2001 to 2003, and would reasonably have grown to \$51,091 for 2006. There are no comparable local employment opportunities for O’Dea.<sup>2</sup> His progression up the ranks at Plum Creek resulted from his longevity with the employer, rather than any transferrable skills that reasonably could command comparable wages from other local employers.

13. Understanding that he had passed the April 21, 2004, IPCS exam, O’Dea reasonably believed that BNSF would hire him effective at the beginning of May 2004. On or about April 21, 2004, he notified Plum Creek that he was leaving employment to begin working for BNSF. O’Dea believed it was appropriate for him to give notice he was quitting, after working for Plum Creek for eleven years.

14. After he received notice that BNSF was withdrawing the conditional offer of employment and rejecting his application, O’Dea contacted his supervisor at Plum Creek and asked if he could keep his job. He was told that because he had quit, he could not return to work. He applied for a job that opened with Plum Creek a month later, and was not hired. He has not applied for work with Plum Creek since, because he believes the employer will not rehire him because he quit. It was reasonable for O’Dea to hold this belief to date.

15. On May 11, 2006, Dr. Ronald Peterson, a physician licensed to practice medicine in Montana, with a specialty practice in occupational and sports medicine, examined O’Dea and concluded that O’Dea’s physical condition and health did not make it unsafe or dangerous for him to perform the BNSF conductor-brakeman job.

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<sup>2</sup> O’Dea was married when he applied for the job with BNSF. He and his wife later divorced. The couple had joint legal custody of their two minor children and O’Dea had primary physical custody at the time of the hearing. Relocation away from his local labor market is now not reasonable.

16. When Plum Creek refused to rehire him, O'Dea went to work for a labor contractor where he earned \$12.00 an hour with no fringe benefits. Since that job ended and until the date of the hearing, he has performed a series of jobs that paid between \$9.50 and \$12.00 an hour. At the time of trial he was working for Conlin Furniture delivering furniture and driving a truck.<sup>3</sup> He was being paid \$9.50 an hour with no fringe benefits. He has earned no fringe benefits since leaving Plum Creek at approximately the beginning of May 2004.

17. In 2005, O'Dea earned \$21,692.00. In 2005, he reasonably could have earned, without the ability to return to Plum Creek or to obtain work with BNSF, \$24,960.00. The average earnings for the nine persons who obtained jobs with BNSF in approximately May 2004 from the hiring process in which O'Dea received a conditional offer of employment were \$59,256.00. For 24 months, from the beginning of May 2004 through the end of April 2006, O'Dea lost earnings of \$2,858.00 per month [ $\$59,256.00$  minus  $\$24,960.00$ , divided by 12] attributable to BNSF's rejection of his employment application because of his perceived disability. Over the 24 months, O'Dea lost \$68,592.00 [ $\$2,858.00$  per month times 24 months].

18. O'Dea's wages, had BNSF hired him, would have grown at 3% per year, beginning in May 2006. His current labor market will not grow as rapidly, but it will grow. A 2% annual net growth rate for O'Dea's lost earnings after April 2006, is reasonable, because the union contracts and more stable conditions for railroad employment than for the kinds of jobs O'Dea is now working more likely than not reflect his future lost earnings..

19. For 12 months, May 2006 through April 2007, O'Dea lost earnings of \$2,956.76 per month [ $\$59,256.00$  times 102% minus  $\$24,960.00$ , divided by 12] attributable to BNSF's rejection of his employment application because of his perceived disability. Over the 12 months O'Dea lost \$35,481.12. For the 15 days from May 1, 2007 through the date of this judgment, with another 2% increase, O'Dea lost another \$1,459.30 [ $\$2,956.76$  times 102% divided by 31 times 15]. O'Dea's wage loss over the past 12.5 months was thus \$36,940.42.

20. But for BNSF's rejection of O'Dea because of his perceived disability, O'Dea would have earned, to date, \$105,532.42 more than he has been capable of earning.

21. Prejudgment interest to the date of this decision on these past lost earnings accrues at 10% simple per annum. For each month of wages lost, O'Dea is entitled to interest at 10% divided by 12 months, for the number of months that have passed since the end of the month in which the wages were lost. Interest to date totals \$12,872.55 for interest accrued on the first 24 months' lost earnings [ $\$23.816$  per month { $\$2,858.00$  per month times .10 divided by 12} times 540.5 months {34.5 months plus 33.5 months plus 32.5 months . . . plus 14.5 months plus 13.5 months plus 12 .5 months}] plus \$1,701.89 for interest accruing on the more recent lost earnings [ $\$24.665$  per month { $\$2,956.76$  times .10 divided by 12} times 69 months {11.5 months plus

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<sup>3</sup> Before working for Conlin's O'Dea had obtained a position with a development company, with prospects of earning approximately \$15.00 per hour. O'Dea believed in this venture, but it failed. It is not a reasonable basis for determining his earning capacity in his present situation.

10.5 months plus 9.5 months . . . plus 2.5 months plus 1.5 months plus .5 months}]. Thus, prejudgment interest to date totals \$14,572.69 [\$12,872.55 plus \$1,700.14].

22. BNSF would have contributed approximately 20% of O'Dea's earnings to his railroad retirement and Medicare accounts. But for BNSF's rejection of O'Dea because of his perceived disability, O'Dea would have earned, to date, \$21,106.48 of such contributions. O'Dea may invest this money, receiving it now, or he may not; he may, should he invest it, accrue a larger benefit upon his eventual retirement or he may not. The reasonable remedy for this loss is to award him that amount.

23. O'Dea reasonably cannot now take a position with BNSF without moving away from Kalispell and either being separated from his children or separating those children from more frequent contact with their mother. BNSF's withdrawal of its conditional job offer to O'Dea did not proximately cause his divorce, but did create the situation in which O'Dea now cannot relocate to take work with BNSF in the location in which it was offered in 2004. He was ready, willing and able to relocate to take the job in 2004. As a result of BNSF's rejection of O'Dea because of his perceived disability, he will continue to suffer lost earnings in the future.

24. O'Dea's opportunity to earn wages and benefits in future employment with BNSF has a value. There is no reasonable certainty that O'Dea would have been able to work for BNSF for the rest of his working life, although that was his intention in 2004. His future losses are reasonably worth an additional recovery of \$200,000.00, paid in four equal installments of \$50,000.00, on each of the first four anniversaries of the date of this decision.<sup>4</sup> Extending recovery more than four years into the future would be speculative.

25. O'Dea had debt while he worked at Plum Creek. He has incurred additional debt since leaving Plum Creek, some of which resulted from medical bills for his children, at least part of which would have been paid had he obtained the job with BNSF, with its benefits. He also discontinued his health club membership, lost his home through foreclosure and lost his car through repossession. He cashed in his Plum Creek 401K plan, containing \$15,000.00. O'Dea has not proved that these financial reversals were solely caused by BNSF's withdrawal of its conditional offer of employment. He did prove that his financial problems would have been less likely and certainly less severe but for the substantial reduction in his earnings that did result from BNSF's adverse action.

26. BNSF's decision not to hire O'Dea because of his weight proximately caused emotional distress to O'Dea. After that decision, O'Dea had far greater financial and marital difficulties (including divorce). The distressful changes in his life that came after BNSF's decision were exacerbated by the reduction in his earning capacity occasioned by BNSF's

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<sup>4</sup> The damage calculations for losses to date (lost wages for the previous year plus 2%, plus 20% of that total for lost benefits) is still less than \$50,000.00 per year on the fourth anniversary of this decision, so the award for future losses is enhanced, in recognition of the possibility he would have continued to work for BNSF beyond four more years, and therefore will continue to suffer losses for more than four years after the date of this decision.

adverse action. All the changes contributed to his emotional distress. The value of that portion of his emotional distress attributable to BNSF's adverse action, for purposes of recovery from BNSF, is \$25,000.00.

27. The future lost benefits, including the railroad retirement plan, that resulted from BNSF's adverse action can best be remedied by requiring BNSF to make the same employer's contributions to Social Security and Medicare a Montana private employer would make for an employee earning the wages (past and future) O'Dea is recovering pursuant to this decision,. Additionally, the amount awarded for his future losses takes into account the future lack of his railroad benefits.

#### IV. OPINION<sup>5</sup>

The hearing examiner's order of August 11, 2006, granting summary ruling on liability, discusses that issue. This opinion only addresses damages.

The department may order any reasonable measure to rectify any harm O'Dea suffered as a result of illegal discrimination. Mont. Code Ann. § 49-2-506(1)(b). The purpose of awarding damages in an employment discrimination case is to make the victim whole. *E.g.*, *P. W. Berry v. Freese* (1989), 239 Mont. 183, 779 P.2d 521, 523; *see also Dolan v. School District No. 10* (1981), 195 Mont. 340, 636 P.2d 825, 830; *accord*, *Albermarle Paper Co. v. Moody* (1975), 422 U.S. 405.

O'Dea lost and will continue to lose earnings (wages and benefits). By proving discrimination, O'Dea established a presumptive entitlement to an award of back pay. *Dolan, supra*; *Albermarle Paper Co., supra* at 417-23. O'Dea proved with reasonable accuracy the wages he lost and the wages he will lose (if he were to work for the BNSF for the rest of his working life) because of BNSF's discrimination. *Horn v. Duke Homes* (7<sup>th</sup> Cir. 1985), 755 F.2d 599, 607; *Goss v. Exxon Off. Sys. Co.* (3<sup>rd</sup> Cir. 1984), 747 F.2d 885, 889. The "back pay" award reasonably redresses (the harm O'Dea suffered to date. *Cf.*, *Rasimas v. Dept. of Ment. Health* (6<sup>th</sup> Cir. 1983), 714 F.2d 614, 626. O'Dea can recover for future lost earnings if and only if he proves that future losses will more likely than not result from the discriminatory acts. *Martinell, op. cit.*, 886 P.2d at 439. The hearing examiner calculated past and reasonable future losses (discussed in detail *infra*) in accord with these authorities.

Prejudgment interest on lost income is a proper part of the damages award. *P. W. Berry, Inc., supra*, 779 P.2d at 523; *European Health Spa v. H.R.C.* (1984), 212 Mont. 319, 687 P.2d 1029, 1033; *see also, Foss v. J.B. Junk* (H.R.C. 1987), HR No. SE84-2345. The hearing examiner calculated that interest.

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<sup>5</sup> Statements of fact in this opinion are hereby incorporated by reference to supplement the findings of fact. *Coffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661.



O'Dea's benefit loss is reasonably remedied by increasing the cash award by 20% for past lost railroad benefits, enhancing the front pay recovery for future benefit loss and requiring employer contributions to Social Security and Medicare.

Placing a sufficiently precise dollar value on the future benefits otherwise would require a crystal ball. The financial calculations of well qualified experts cannot suffice to establish the appropriate reasonable remedy for future lost benefits. Although Joseph Kasperick utilized (and supported) use of 20% of earnings as the cost of the future benefits, he necessarily lacked the soothsayer skills to particularize the present value of the eventual benefit payments. The actual worth to O'Dea of the retirement plan, for one example, would be the present value of an entitlement at retirement to particular benefits. The amounts of the future benefits depend in large part upon how long O'Dea would have continued to work for BNSF. For another example, the actual loss to O'Dea of the medical insurance provided by BNSF would be the expenses incurred that would have been paid by the insurance had BNSF hired O'Dea, which depends both upon how long he would have worked for the railroad and what covered future medical expenses he incurs. The present value of the future benefits is thus too uncertain to be quantified, except by reasonable enhancement of amount of the the four year front pay award.

For future relief from a discriminatory refusal to employ, the preferred remedy is reinstatement. *Cassino v. Reichhold Chem. Inc.* (9<sup>th</sup> Cir. 1987), 817 F.2d 1338, 1346. When an order for reinstatement or hire is not an option, front pay can be awarded. *Fortino v. Quazar Co.* (7<sup>th</sup> Cir. 1991), 950 F.2d 389, 398. "Front pay" is an award for probable future losses in earnings, salary and benefits to make the victim of discrimination whole when placement in the lost job is not feasible—it is usually temporary to permit the victim to reestablish his "rightful place" in the actual job market. *Martinell, op. cit.*; *Rasmussen v. Hearing Aid Inst.*, (H.R.C. 1992) HR Case #8801003988, **approved**, *H.A.I. v. Rasmussen* (1993), 258 Mont. 367, 852 P.2d 628, 635; *Sellers v. Delgado Com. College* (5<sup>th</sup> Cir. 1988), 839 F.2d 1132; *Shore v. Fed. Ex. Co.* (6<sup>th</sup> Cir. 1985), 777 F.2d 1155, 1158.

Front pay is appropriate if it is impossible or inappropriate to order the BNSF to employ O'Dea. Due to the changes in his family situation, it is. Absent the option of reinstatement, future losses become increasingly speculative over time. Ascertaining future lost wages is necessarily an exercise in reasoned speculation. The hearing examiner cannot hold O'Dea to an unrealistic standard of proof (*see Horn, op. cit.*), yet there must be credible and substantial evidence to support a finding that future lost wages extend into the distant future.

The facts here do include evidence of O'Dea's intent to stay with the railroad, which is credible in light of his labor market in Kalispell and the higher pay available from the job with BNSF, situated in Havre. Nevertheless, there is obviously some turnover for railroad employees. Normal attrition over the years reduces O'Dea's statistical prospects of working for BNSF until he retires. O'Dea might face future health problems, whether related to the hazards of railroad work, the possible hazards of morbid obesity or the normal life hazards of all persons, which could impact his employment future. His current family status, will inevitably change over time and might make it possible for him to relocate to a more favorable employment locale. The



railroad might face financial problems in the future that could result in changes to its retention and pay practices. O'Dea's career goals might change over the years. He might get additional training or education. He could attempt again to return to work with Plum Creek. If he were to be successful, it would substantially decrease his future losses. The questions that cannot be answered regarding future losses are endless.

Montana law gives weight to these kinds of concerns about the accuracy of long-range prognostication of future wage loss. In the Montana Wrongful Discharge from Employment Act, recovery of lost wages and fringe benefits is for a maximum of four years from the date of discharge. Mont. Code Ann. § 39-2-905(1). There is no comparable statutory limitation applicable to human rights complaints, but clearly the legislature wants future lost wages awards to be carefully considered before extending them far into the future.

The damage award in this case follows the same reasoning as was applied in *Bilbruck v. BNSF* (Final Agency Decision, 8/3/2004), H.R. No. 0031010549, *aff. by* H.R.C. (11/19/2004). Although *Bilbruck* is still embroiled in litigation in federal court, it is authoritative for cases before the department on perceived disability discrimination when an employer withdraws a conditional offer of employment to a "morbidly obese" individual with no related health problems, entirely because of the morbid obesity, without independently assessing the individualized reasonable probability of substantial harm.

Although the Montana Wrongful Discharge from Employment Act has an absolute four year limit upon damages, beginning to run from the date of discharge, a more flexible standard, "any reasonable measure . . . to rectify any harm, pecuniary or otherwise," applies here. Mont. Code Ann. § 49-2-506(1)(b). Enhanced front pay for four years from the date of this decision is reasonable to address the losses that O'Dea will suffer, but which become more difficult to quantify further into the future. This award, in addition to the award for losses to date, is reasonable and supported by the credible and substantial evidence of record. A larger or longer term front pay award is not sufficiently supported and would be unreasonably speculative. Use of a 2% net increase in earnings for BNSF employment as opposed to employment with entities such as Conlin Furniture is likewise reasonable.

O'Dea also sought recovery for his emotional distress. The department can require any reasonable measure to rectify "any harm, pecuniary or otherwise" suffered because of the discrimination. Mont. Code Ann. § 49-2-506(1)(b). Emotional distress damages are within the scope of the statute. *Vainio v. Brookshire* (1993), 258 Mont. 273, 281, 852 P.2d 596, 601. Emotional distress recoveries for illegal discrimination under the Human Rights Act follow *Vortex Fishing Systems v. Foss*, 2001 MT 312, 308 Mont. 8, 38 P.3d 836.

O'Dea's emotional distress was obviously more severe than that of the plaintiffs in the case of *Johnson v. Hale* (9<sup>th</sup> Cir.1991), 940 F.2d 1192; *cited in Vortex at* ¶33. In *Johnson*, the plaintiffs suffered emotional distress resulting from the refusal of a landlord to rent living quarters to them due to their race. Those plaintiffs suffered no economic loss because they were able immediately to find other housing. The incident upon which they based their claim lasted

only a fleeting time on a single day. The landlord's refusal to rent to them because of their race occurred with no one else present to witness their humiliation. There was no evidence of any recourse to professional treatment or lasting impact upon their psyches as a result of the discriminatory act. Nevertheless, the appeals court increased their awards from \$125.00 to \$3,500.00 each for the overt racial discrimination.

In *Vortex*, the Court affirmed an award of \$2,500.00 for emotional distress damages resulting from Ben Foss' loss of his job. Much of that emotional distress stemmed from financial problems due to loss of an existing income. O'Dea lost both his existing income from Plum Creek and a higher income from BNSF, and suffered more extreme financial problems.

The freedom from illegal discrimination is a fundamental human right under Montana law. Mont. Code Ann. § 49-1-102. Violation of that right is a *per se* invasion of a legally protected interest. Like the plaintiffs in *Johnson*, O'Dea is presumed to have suffered emotional distress resulting from invasion of this legally protected interest, despite not seeking professional help for that distress. It is the nature of a fundamental human right that its violation generates emotional distress. No reasonable person is expected to endure harm, including emotional distress, resulting from violation of a fundamental human right. *Johnson; Vainio, op. cit.; Campbell v. Choteau Bar and Steak House* (H.R.C. 1993), HR No. 8901003828.

The evidence of O'Dea's emotional distress supports the \$25,000.00 award, which is almost triple the emotional distress of the claimant in *Bilbruck, op. cit.*, whose financial distress was substantially less than that endured by O'Dea. O'Dea lost both the opportunities inherent in employment with BNSF and a stable and relatively high paying job with Plum Creek, because he reasonably relied upon getting the job with BNSF when he had successfully completed the last of the physical capacities testing the railroad required. This substantial loss in his earning capacity and working status resulted in substantially greater emotional distress. BNSF set in motion a chain of events, when it withdrew its conditional offer of employment, that cost O'Dea his stable and lucrative job with Plum Creek, no doubt contributed to the end of his marriage, substantially increased his financial distress and severely impacted his financial future.

Upon a finding of illegal discrimination, the law requires affirmative relief that enjoins any further discriminatory acts and may further prescribe any appropriate conditions on the respondent's future conduct relevant to the type of discrimination found. It is proper and reasonable to enjoin BNSF from similar conduct in the future, and require it to adopt a policy, for Montana hiring decisions, to document future treatment of similar persons. Mont. Code Ann. § 49-2-506(1)(a) and (b). As already noted, this is the second case involving similar incidents of discrimination against healthy applicants who are statistically morbidly obese but not suffering from any limitations. Because the first case is still pending in another tribunal, the same affirmative relief is appropriate here.

## V. CONCLUSIONS OF LAW

1. The Department has jurisdiction over this case. §49-2-509(7) MCA.

2. BNSF illegally discriminated against O'Dea, because of a perceived disability, by withdrawing its conditional employment offer without first undertaking an independent individualized assessment of any resulting risk of substantial harm either to O'Dea or others. Mont. Code Ann. §§ 49-2-101(19) and 49-2-303(1)(a).

3. BSNF's illegal discrimination resulted in harm to O'Dea, and, to remedy that harm, must immediately pay to O'Dea (a) the sum of \$105,532.42 for lost wages to date, making appropriate deductions for taxes and employee contributions to Social Security and Medicare and appropriate employer contributions to Social Security and Medicare; (b) the sum of \$21,106.48 for loss of benefits to date; (c) the sum of \$14,572.69 for prejudgment interest on the lost wages to date; and (d) the sum of \$25,000.00 for his emotional distress. To remedy future harm, BNSF must pay to O'Dea \$200,000.00, by \$50,000.00 payments on May 15, 2008, May 15, 2009, May 17, 2010 and May 16, 2011. Mont. Code Ann. § 49-2-506(1)(b).

4. The department permanently enjoins BNSF from discrimination in employment against prospective employees because of conditions it regards as disabilities without first undertaking an independent individualized assessment to verify the risk of substantial harm to the prospective employees or others. Mont. Code Ann. § 49-2-506(1)(a).

5. The department enjoins and requires BNSF, within 60 days after this decision becomes final, to submit to the Human Rights Bureau proposed policies to comply with the permanent injunction, including the means of publishing the policies to present and future employees and applicants for employment, and to adopt and implement those policies, with any changes mandated by the Bureau, immediately upon Bureau approval of them. The department enjoins and requires BNSF to obtain training in disability discrimination under Montana law for its employees who make decisions regarding rejection or further investigation of prospective employees because of conditions regarded as disabilities, specifically including within the training the necessity for independent individualized assessment to verify the risk of substantial harm to the prospective employees or others. The training must have a duration of at least four hours. BNSF must, within 60 days after this decision becomes final, submit a training plan to the Human Rights Bureau and implement that plan, with any changes HRB mandates, immediately upon HRB approval of it.

## VI. ORDER

1. Judgment is found in favor of charging party **Matt O'Dea** and against respondent **BNSF Railway Company** on the charge that the respondent discriminated against the charging party on the basis of disability (obesity) when it denied him the position of conductor-trainee.

2. Respondent must immediately pay to the charging party the sum of \$166,211.59, and thereafter an additional \$200,000.00, over four years, in conformity with the provisions of Conclusion of Law No. 3.

3. Respondent must obey the mandates of Conclusions of Law Nos. 4-5.

Dated: May 15, 2007

/s/ TERRY SPEAR

Terry Spear, Hearing Examiner

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#### CERTIFICATE OF MAILING

The undersigned hereby certifies that true and correct copies of the foregoing document were, this day, served upon the parties or their attorneys of record by depositing them in the U.S. Mail, postage prepaid, and addressed as follows:

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DATED this 15th day of May, 2007.

/s/ SANDRA PREBIL

Legal Secretary, Hearings Bureau  
Department of Labor and Industry

